NO. 56593-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENVER BRAGG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Joely O'Rourke, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant Denver Bragg's constitutional right to privately confer with counsel at all critical stages of the proceedings.

2a. The trial court erred in refusing to exclude DNA results under CrR 8.3(b), where the prosecution failed to act with due diligence in collecting Bragg's DNA.

2b. Defense counsel was ineffective for failing to cite relevant authority that supported exclusion of the DNA results.

3a. The trial court erred in denying Bragg's mistrial motions after the prosecution violated a pretrial ruling.

3b. The trial court erred in admitting ER 404(b) evidence without conducting any balancing on the record.

4. The trial court erred in failing to recognize its authority to impose concurrent sentences for multiple serious violent offenses.

5. The trial court erroneously ordered Bragg to pay discretionary community supervision fees.

Issues Pertaining to Assignments of Error

1. Must Bragg's convictions and sentence be reversed, where he appeared by video from jail, physically separated from his attorney who was present in the courtroom, for every single pretrial and posttrial hearing, violating Bragg's constitutional right to confer with his attorney continuously and privately at all critical stages of the proceedings?

2a. Must Bragg's convictions be reversed, where the prosecution failed to act with due diligence in collecting Bragg's DNA, constituting mismanagement, and that delay prejudiced Bragg by forcing him to choose between his right to a speedy trial and his right to prepared counsel, warranting exclusion of the DNA results under CrR 8.3(b)?

2b. Alternatively, must Bragg's convictions be reversed where defense counsel was ineffective for failing to research and cite controlling authority that would have guided the trial court's exercise of discretion under CrR 8.3(b)?

3a. Must Bragg's convictions be reversed, where the trial court erred in denying his multiple mistrial motions after the prosecution violated a pretrial ruling by introducing evidence of Bragg's outstanding arrest warrants?

3b. Alternatively, must Bragg's convictions be reversed, where the trial court erred in thereafter admitting unfairly prejudicial evidence of Bragg's outstanding arrest warrants, without a limiting instruction and without conducting any balancing on the record?

4. Is remand for resentencing necessary, where the trial court failed to recognize its authority under RCW 9.94A.535(1)(g) to impose concurrent sentences for multiple serious violent offenses, constituting a fundamental defect in Bragg's sentence?

5. Is remand necessary for the trial court to strike discretionary supervision fees from Bragg's judgment and sentence?

B. STATEMENT OF THE CASE

1. **Substantive Evidence**

Denver Bragg dated Rebekah Simmons, whose sister is Sherry Hitch. 4RP 257, 335-37.[1] In March and April of 2021, Bragg and Simmons lived at a house of Hitch's in Ethel, Washington. 4RP 337-38. Hitch did not regularly stay there. 4RP 347. Hitch owned a "Tiffany Blue" Ruger pistol, which she usually kept on her person but took off at night. 4RP 338-40. Hitch noticed the pistol was missing sometime after she spent a night at the Ethel house. 4RP 339-40, 347. She reported the gun stolen in late April of 2021. 4RP 255-56, 343.

Bragg became a suspect in the stolen firearm investigation. 4RP 255-56. Late at night on May 3, 2021,

[1] This brief refers to the verbatim report of proceedings as follows: **1RP** – May 4, 6, July 1, 8, 15, August 12, 26, September 30, 2021; **2RP** – May 27, June 3, July 22, August 5, November 1, December 2, 2021; **3RP** – October 14, December 9, 202; **4RP** – December 6, 2021 (actually December 30), January 3, 4, 5, 6, 2022 (Vol. I); **5RP** – December 6, 2021 (actually December 30), January 3, 4, 5, 6, 2022 (Vol. II); **6RP** – December 29, 30, 2021, January 19, 2022; **7RP** – January 12, 2022.

Lewis County Sheriff's Deputies Blake Teitzel and Matt Wallace saw a silver Ford station wagon pass by the Ethel Market. 4RP 166-67. Bragg owned a similar vehicle. 4RP 258. The vehicle did not have a license plate and failed to signal when it turned just past the Market. 4RP 260.

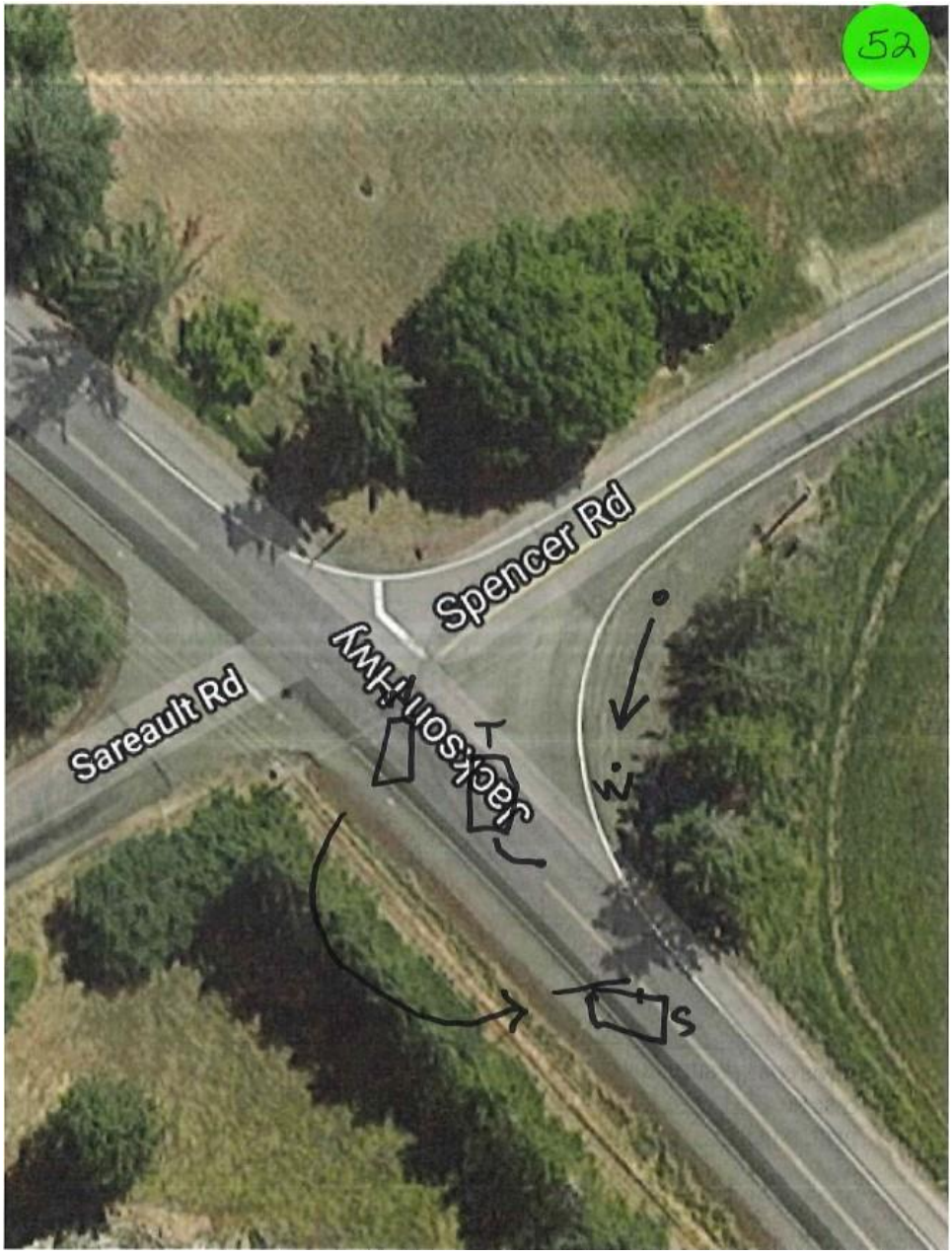
Based on the traffic violation and their suspicion that Bragg was driving, the deputies pursued the Ford station wagon. 4RP 260-61. When they had to exceed 100 miles per hour to catch up with the station wagon, the deputies activated their lights and sirens. 4RP 174-76. Bragg, who was indeed driving the station wagon, failed to stop. 4RP 174, 177.

A high speed chase ensued. 4RP 177-85, 194-209. Bragg conceded attempting to elude at his subsequent jury trial, so a turn-by-turn of the chase will not be recounted here. 5RP 610. In brief summary, Bragg exceeded posted speed limits, failed to stop at stop signs and stop lights, and weaved between lanes. See, e.g., 4RP 200-08, 264, 282-84. Bragg also threw

several items out the window, including a blanket, pressure washer, and cell phone. 4RP 202-03, 209.

At the intersection of Spencer Road and Jackson Highway, Deputy Emmet Woods deployed spike strips to try to stop Bragg. 4RP 403-05. Woods took cover on foot behind a utility pole. 4RP 405. As Bragg traveled down Spencer Road and turned left onto Jackson Highway, he swerved to avoid the spike strips. 4RP 406. Bragg supposedly lost control and slid off the road into a ditch, with Deputy Wallace and Deputy Teitzel still in pursuit. 4RP 406-07.

The intersection was dark, illuminated only by the deputies' headlights. 4RP 182, 250, 409. As they rounded the intersection and Bragg supposedly reentered the roadway after getting stuck in the ditch, they saw Bragg's arm extend out the window. 4RP 186, 272. Deputy Teitzel drew the following diagram at Bragg's trial:



Ex. 52; 4RP 185-86 ("W" for Wallace's vehicle; "T" for Teitzel's vehicle; "S" for Suspect; and "W" for Woods on foot).

Deputy Teitzel explained he could not see what was in Bragg's hand but heard three consecutive noises. 4RP 187. He believed Bragg fired a gun at them but admitted he did not see a muzzle flash. 4RP 187-89.

Deputy Woods claimed to see a muzzle flash and heard three quick shots, followed by a pause, and then one more shot. 4RP 409. But Deputy Woods admitted he could not see where the gun was pointed because of the poor lighting. 4RP 424.

Even though Deputy Wallace was farther away than Deputy Teitzel, he claimed he could see a gun and three rapid muzzle flashes, apparently followed by a fourth shot. 4RP 272-73. Deputy Wallace described Bragg's arm as level with the road, suggesting he was aiming, but Wallace conceded Bragg could not have hit him, given the angle. 4RP 276, 296.

The chase continued, eventually ending in Chehalis. 4RP 192-93, 208-09, 241. Deputy Woods executed a pursuit immobilization technique (PIT) maneuver, causing Bragg to spin out and crash into a NAPA Auto Parts building. 4RP 218-

19, 416-17. No gun was found on his person or in his vehicle. 4RP 217, 231-32. That night Bragg admitted to medical staff that he had used methamphetamine, heroin, and an assortment of unknown pills before driving. 4RP 292.

After the chase, Deputy Teitzel noticed a small, jagged dent on his front right fender. 4RP 221-23; Ex. 40. He speculated the indentation may have been caused by a bullet ricochet, even though a bullet strike on his right fender would have been impossible based on his diagram. 4RP 229-30, 247-48. All three deputies acknowledged they did not hear any bullet impacts. 4RP 222, 275, 298, 411.

In the afternoon the next day, a public works employee for the City of Toledo, John Cravens, found a Ruger pistol in the grass at an intersection along the chase route. 4RP 301-02, 328. He turned the gun over to the Toledo chief of police, John Brockmueller. 4RP 313. Both men handled the gun with their bare hands. 4RP 303, 315-16.

Deputies collected both men's DNA, along with Sherry Hitch's, within just a couple days of May 4, to compare to any DNA on the firearm. 4RP 293, 308, 316. Bragg's DNA was not collected until November 1, nearly six months later. 3RP 6; 4RP 366-67. Testing indicated the presence of DNA from Cravens, Brockmueller, Bragg, and an unknown female on the pistol. 4RP 446-49. Hitch was excluded as a contributor. 4RP 449. DNA from Bragg and two other unknown contributors was also found on the magazine. 4RP 450.

The pistol appeared to have originally been an aqua color but had been painted black. 4RP 326-27. Hitch thought the gun might be hers, but did not know the serial number of her gun. 4RP 344-45, 347-48.

Police found two shell casings near the intersection of Spencer Road and Jackson Highway, one in middle of the road and one in the ditch eight to ten feet off the road. 4RP 353-55, 363-66. Subsequent testing indicated the two casings were fired by the recovered Ruger. 4RP 469.

2. **Charges and Preliminary Hearings**

The prosecution charged Bragg on May 4, 2021, with three counts of first degree assault with firearm enhancements (Counts 1-3), drive-by shooting (Count 4), attempting to elude a pursuing police vehicle with a firearm enhancement (Count 5), unlawful possession of a firearm (Count 6), and possession of a stolen firearm (Count 7). CP 1-5, 39-44. The prosecution further alleged the aggravating factor that Counts 1-4 were committed against law enforcement officers while performing their official duties. CP 39-42.

Bragg appeared for every single pretrial hearing by Webex video conferencing from jail, while his attorney appeared in person in the courtroom. 1RP 3, 9, 12-15, 17, 19, 22; 2RP 4, 5, 9, 14, 16, 22-23, 37; 3RP 2, 5; 4RP 6; 6RP 3, 16; CP 194-204. At no time did the trial court specify ground rules for how Bragg and his attorney could confer privately during any of these hearings. See id.

Bragg's preliminary appearance took place on May 4. 1RP 3; CP 184. The court set Bragg's bail at $750,000 cash or bond. 1RP 5-7. The court refused to reconsider Bragg's bail at any subsequent hearing and Bragg remained in custody pending trial. 4RP 23; 6RP 14. Bragg was arraigned on May 6 and pleaded not guilty to all counts. 1RP 9-10; CP 185.

On May 27, the omnibus hearing was continued for a week. 2RP 4; CP 186. At a hearing on June 3, Bragg agreed to waive his speedy trial right, making August 2 the last allowable day for trial. 2RP 5-6; CP 16, 187.

After two continuances, omnibus was held on July 15. 1RP 12-15; CP 189-91. Bragg's counsel asserted possible defenses of general denial, diminished capacity, and intoxication. 1RP 15.

Trial confirmation was held on July 22. 2RP 9; CP 192. Defense counsel informed the court that Bragg wanted a new attorney. 2RP 10. Counsel noted "we had quite the blowup yesterday," explaining, "there's some real issues there." 2RP

10. Bragg told the court his attorney was "calling me stupid and calling me dumb and he was calling me all kind of names yesterday." 2RP 10. The court ordered Bragg to continue working with his attorney. 2RP 11.

Later at the same hearing, defense counsel expressed concern about Bragg proceeding to trial, given the amount of time he faced if convicted. 2RP 12-13. The court recessed for counsel to speak with Bragg at the jail. 2RP 13-14. When the parties reconvened that afternoon, defense counsel asked the court to order a competency evaluation. 2RP 14-15. The court did so and struck Bragg's trial date. 2RP 15; CP 17-21.

A competency assessment was completed and filed on August 3, finding Bragg competent to stand trial. CP 28. That same day, the prosecution filed a motion to obtain a buccal swab from Bragg "to determine if any DNA on the firearm or magazine belongs to the defendant." CP 146-48.

A competency review hearing was held on August 5. 2RP 16; CP 193. Defense counsel told the court he was

"reluctant to agree" to Bragg's competency, questioning Bragg's "ability to assist in his own defense." 2RP 16. Counsel asked to obtain a separate competency evaluation, to which Bragg objected. 2RP 17-19. The court set the matter over a week. 2RP 19; CP 193. The court also entered an order authorizing the prosecution to obtain a buccal swab from Bragg. 2RP 21; CP 149-50.

After a continuance on August 12, the parties reconvened on August 26 for another competency review hearing. 1RP 17, 19; CP 194-95. Upon defense counsel's agreement, the court found Bragg competent to stand trial. 1RP 19; CP 30. The court reset Bragg's trial for October 4, with speedy trial expiring on October 30. 1RP 20-21; CP 195.

The parties appeared on September 30 for trial confirmation. 1RP 22; CP 196. Substitute counsel requested a continuance, to which Bragg expressed confusion because neither substitute counsel nor his appointed counsel had met with him about the need for a continuance. 1RP 22-24. Bragg

indicated he wanted to fire his appointed attorney. 1RP 24. The trial court continued Bragg's trial to December 6 and reset the speedy trial expiration to January 1, 2022, over Bragg's objection. 1RP 24-25; CP 196.

A hearing was held on October 14 to review Bragg's request for new counsel. 3RP 3; CP 197. Defense counsel indicated Bragg was "unhappy with what's going on," but Bragg had nothing to say at the hearing. 3RP 4.

The next hearing was held on November 1. 2RP 22-23; CP 198. The prosecution explained a sheriff's deputy attempted to collect Bragg's DNA the previous Friday, October 29, but Bragg had refused. 2RP 23-24. The prosecution acknowledged the buccal swab order was entered on August 5, but no attempt was made to collect Bragg's DNA for nearly three months. 2RP 23. The prosecution could not explain the delay: "I thought it had been taken, but it wasn't." 2RP 23.

Bragg again requested to fire his attorney, indicating a lack of trust. 2RP 26, 29. Bragg explained, "He keeps trying to

get me to confess to something I didn't do, Your Honor." 2RP 29. The court informed Bragg that appointment of new counsel would require resetting speedy trial. 2RP 30. The court ultimately muted Bragg after a contentious debate, and then ordered Bragg to submit to the buccal swab. 2RP 35. Bragg's DNA was collected that same day, November 1. CP 38.

Trial confirmation was held on December 2. 2RP 37; CP 199. The defense confirmed it was ready for trial. 2RP 37. The prosecution, however, requested a continuance because it was awaiting DNA results. 2RP 37. Defense counsel asked the court to deny a continuance, emphasizing the delay in collecting Bragg's DNA, from August 5 to October 29, "when they sat on it for what amounts to about three months and my client is sitting in custody." 2RP 38. Counsel asserted, "I don't think they have a good basis at this point." 2RP 38. When Bragg asked how he could talk to his attorney, the court responded, "You can be quiet, for one." 2RP 40. The court set the matter

over a week, requesting the prosecution file a written request for a continuance. 2RP 39-40.

The parties reconvened on December 9, following the prosecution's written continuance request and the defense's written objection. 3RP 5; CP 31-33, 151-52, 200. The prosecution still could not explain the delay in collecting Bragg's DNA: "I don't have an answer as to what happened to the [buccal swab] order." 3RP 6. The prosecution noted the order was taken to the sheriff's office, but "apparently the sheriff's office failed to act on the order itself." 3RP 6.

Defense counsel responded that Bragg "is very adamant that he wants his trial to go next week." 3RP 8. Counsel reiterated the prosecution "waited until August to ask for a DNA sample" and then waited another three months "before they went to collect the sample." 3RP 8. The delay prevented the defense from countering the DNA results with its own expert. CP 33. Counsel put it bluntly, "this conundrum was created by the State." 3RP 9. Consequently, counsel asserted,

Bragg should not be "forced into a choice -- a constitutional choice" of giving up his right to a speedy trial and his right to a prepared defense. 3RP 9; CP 33.

The trial court admitted "it's difficult to find that the State has acted with diligence." 3RP 11. The court nevertheless found good cause to continue Bragg's trial to January 3, 2022, finding no prejudice to Bragg because "[t]he DNA could be in his favor." 3RP 10-11.

The DNA results came back on December 28. Ex. 71; 6RP 3. The forensic scientist, Amelia Bussell, found "very strong support" for inclusion of Bragg as a contributor to DNA on the Ruger pistol. Ex. 71. Assuming four contributors, Bussell found it was "2.1 sextillion (10^21) times more likely to observe this DNA profile if it originated from Denver Bragg and three unknown individuals than if it originated from four unrelated individuals selected at random from the U.S. population." Ex. 71. The results were similar for Bragg's DNA on the magazine (190 octillion). Ex. 71.

On December 29, Bragg's attorney filed a written motion to withdraw as counsel, citing "no working relationship between Mr. Bragg and myself." CP 154. Counsel explained their relationship had deteriorated and, in their meetings, Bragg "mostly yells, swears and insults me." CP 154.

The court held a hearing the same day. 6RP 3; CP 201. Defense counsel reiterated, "I have really tried to work with Mr. Bragg, but it is just not working out." 6RP 3. Counsel described a misunderstanding about how damaging the DNA results were for Bragg's case. 6RP 3-4. Counsel indicated, "most likely, would probably be best for him to have some of his own independent expert testing, just to see if that could be refuted." 6RP 3-4. Bragg told the court his attorney was "scared to go to trial," expressing, "if he wants to fire himself, then fine." 6RP 5. The court explained again that a new attorney would need a continuance. 6RP 10. After Bragg reiterated his desire to go to trial, the court denied counsel's request to withdraw. 6RP 13-15.

The parties reconvened the next day, December 30. 6RP 16; CP 202. Defense counsel expressed "grave concern" about Bragg's competency, indicating Bragg misunderstood the DNA results. 6RP 17-19. Bragg stated, "[t]he [DNA] numbers are saying the complete opposite of what he's telling me." 6RP 19-20. Defense counsel explained Bragg did not want him to retain an independent DNA expert, but instead wanted to go to trial on January 3, as scheduled. 6RP 17, 21.

The trial court held a pretrial conference later that same day, December 30, to consider the parties' motions in limine. 4RP 6; CP 203-04. The parties discussed impeachment evidence for one of the testifying deputies. 4RP 10-11. The court also reviewed Bragg's trial rights with him. 4RP 28-29.

The court then heard a defense motion to exclude the DNA results based on the prosecution's failure to act with due diligence in collecting Bragg's DNA. 4RP 13-16, 19; CP 45-46. Defense counsel again pointed to the nearly three month

delay after entry of the buccal swab order before the sheriff's office attempted to collect Bragg's DNA. 4RP 13-14.

Counsel asserted this unreasonable delay now forced Bragg to choose between "his constitutional right to a speedy trial, or his constitutional right to prepare counsel." 4RP 15. Counsel indicated he could obtain an expert to reevaluate the DNA results, but Bragg did not want to waive speedy trial again. 4RP 15. Counsel emphasized, "It's not my client's fault, but he's now faced to have to deal with this expert report and damning evidence and no way to really defend against it without giving up one of his constitutional rights." 4RP 15.

The prosecution still could not give a reason for the delay: "So the order was entered quite some time ago, but for whatever reason, and I still haven't been able to figure it out, the swab wasn't taken by the Sheriff's Office." 4RP 16. The prosecution conceded the initial testing of the gun was done "months ago" and "we knew there was DNA on the gun and the magazine." 4RP 17. The prosecution nevertheless asked the

court to deny exclusion of the DNA results as "an extreme remedy," further noting defense counsel "cites no authority for that in his motions in limine." 4RP 18.

The trial court acknowledged, "I understand the Defense's concern." 4RP 20. Regardless, the court agreed with the prosecution that exclusion of the evidence "would be an extreme remedy for a situation like this." 4RP 20. The court noted the unexplained delay in collecting Bragg's DNA, but refused to find "any negligence or misconduct on behalf of the State." 4RP 20. The court emphasized "[r]esults for DNA often take a long time," and did not see "that there would be any violation of speedy trial rights." 4RP 20.

Finally, the defense moved to exclude evidence of prior bad acts under ER 404(b), such as "other unrelated contacts with law enforcement." 4RP 25. Defense counsel agreed evidence of Bragg's predicate conviction for unlawful possession of a firearm was admissible, but argued evidence "[c]ompletely unrelated to the predicate" should not be

admitted. 4RP 24-25. The trial court ruled that such evidence "would be inadmissible" and the prosecution agreed. 4RP 25.

3. **Trial, Verdicts, and Sentencing**

Trial began on January 3, 2022, with Bragg appearing for the first time in person in the courtroom, rather than by video from jail. CP 157; 4RP 31.

In opening, the prosecution stated, "And in running the defendant, [the deputies] discovered that he has some outstanding warrants for his arrest, and he has a suspended driver's license." 4RP 127. The prosecution reiterated the deputies pursued Bragg not only for the traffic infractions and the stolen firearm, "but because they also know that he has arrest warrants." 4RP 128.

Defense counsel moved for a mistrial based on the prosecution's violation of the court's ruling in limine. 4RP 148-50. Counsel pointed out there were multiple other admissible reasons besides the arrest warrants that the deputies pursued Bragg. 4RP 149. Counsel emphasized, "So now the

jury thinks that my client clearly has other criminal history that he's on warrant status for, and he's driving suspended both cast him in a very negative light." 4RP 150.

The prosecution claimed, for the first time, that Bragg's arrest warrants were admissible as evidence of "motive for him to run." 4RP 150. The prosecution contended defense counsel "should have brought a motion specific to that issue, but he didn't." 4RP 150.

The trial court agreed with the prosecution, ruling Bragg's outstanding arrest warrants were admissible for his motive to elude, and denied the mistrial motion. 4RP 151-52, 154. "It shows consciousness of guilt, why he was trying to get away," the court reasoned. 4RP 152. The court believed defense counsel did not move to exclude Bragg's arrest warrants. 4RP 152. The court did not balance the probative value of the evidence against the risk of undue prejudice, even after learning Bragg's warrants were only for driving with a suspended license. 4RP 151-55. The court ruled, "I would

prefer not to get into what the warrants are for." 4RP 154. The court did not offer to give a limiting instruction, and none was given at Bragg's trial. 4RP 154-55.

Deputy Teitzel subsequently testified Bragg had "some active warrants." 4RP 166.

Another deputy testified during trial that he collected Bragg's DNA on November 1, explaining, "I approached him at the facility he was in." 4RP 367. Defense counsel moved for another mistrial, pointing out the testimony was "clearly a reference to him being in custody." 4RP 369. The prosecution claimed "[t]he facility, could be anything," like a hospital. 4RP 369. Defense counsel noted the timeframe, emphasizing, "I think the only logical conclusion is he contacted him at the jail." 4RP 370. The court acknowledged, "I can definitely see [defense counsel's] point," agreeing that, for "people that work in this field, like you and myself, it was obvious that he was talking about the jail." 4RP 370. But the court denied the

mistrial motion, reasoning it was "vague enough" that jurors might not assume "facility" meant jail. 4RP 370.

In closing, the prosecution reemphasized Bragg's outstanding warrants among the multiple possible motives to flee law enforcement:

> Well, you heard testimony -- I already talked about the possession of a stolen firearm. He probably knew law enforcement was looking for him. He didn't want to get caught with that because he had it in his possession. He knew it was reported stolen. *He had active warrants. We heard testimony about that*. Was he high? You heard him tell medical staff that he had used heroin and meth. Or maybe it was all of the above.

5RP 583 (emphasis added).

The trial court dismissed the unlawful possession of a firearm charge (Count 6), because the prosecution could not produce a certified copy of Bragg's qualifying conviction. 5RP 506, 526-29. The jury found Bragg guilty as charged on all remaining counts. CP 102-13.

The parties appeared on January 12, 2022 for sentencing, Bragg again appearing by video from jail, while his attorney

appeared in person. 7RP 3; CP 205. Bragg exercised his right to allocution, admitting, "I feel terrible for what I've done, and I know it was very stupid and malicious." 7RP 13. The trial court adopted the prosecution's recommended mid-range sentence. 7RP 6, 19. Because of mandatory consecutive sentences for the three first degree assaults and four firearm enhancements, the court sentenced Bragg to 648 months in prison. 7RP 18-19, CP 128. No one addressed whether the presumptively consecutive sentences would result in a sentence that was clearly excessive in light of the purposes of the Sentencing Reform Act of 1981 (SRA). 7RP 3-19.

Bragg timely appeals. CP 135.

C. ARGUMENT

1. **Bragg appeared by video, physically separated from his attorney, at every pretrial and posttrial hearing, violating Bragg's constitutional right to privately confer with his attorney at all critical stages of the proceedings.**

Bragg appeared by video from jail, while his attorney appeared in person in the courtroom, for every single hearing except trial. The trial court never laid any ground rules for how Bragg could privately confer with his attorney at these hearings and there is no indication that he was allowed to do so. Bragg was therefore denied his constitutional right to consult with his attorney, privately and continuously, at all critical stages of the litigation, necessitating reversal of his convictions.

Our federal and state constitutions guarantee criminal defendants the right to assistance of counsel at all critical stages of the litigation. U.S. CONST. amend. VI; CONST. art. 1, § 22; State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). "A critical stage is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which

the outcome of the case is otherwise substantially affected.'" Heddrick, 166 Wn.2d at 910 (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

"The constitutional right to counsel demands more than just access to a warm body with a bar card." State v. Anderson, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021), review denied, 199 Wn.2d 1004 (2022). Among other things, it requires the "opportunity for private and continual discussions between defendant and his attorney." State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). "The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful." Anderson, 19 Wn. App. 2d at 562. Given the importance of the right to confer, courts must "closely monitor" any limitation on it. State v. Ulestad, 127 Wn. App. 209, 214, 111 P.3d 276 (2005).

Division Three recently held the denial of this right to be manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). Anderson, 19 Wn. App. 2d at 563.

On his direct appeal, Anderson won resentencing on three limited matters—a vague community custody condition, two scrivener's errors, and erroneous imposition of legal financial obligations (LFOs). Id. at 559. Anderson attended his resentencing hearing by video, while his attorney appeared telephonically. Id. During the hearing, there was no discussion of whether Anderson consented to appear by video. Id. Nor was there any clarification whether Anderson and his attorney were able to communicate throughout the hearing. Id.

The Anderson court distinguished these facts from State v. Gonzales-Morales, 138 Wn.2d 374, 979 P.2d 826 (1999). There, Gonzales-Morales required a Spanish interpreter to communicate with counsel and understand the court proceedings. Id. at 376. During trial, the prosecution called a Spanish-speaking witness, but was unable to secure its own interpreter. Id. at 376-77. The court allowed the prosecution to "borrow" Gonzales-Morales's interpreter, subject to certain ground rules. Id. at 377. The court ordered the interpreter to

remain at the defense table during the testimony. Id. at 387. The court also specified Gonzales-Morales could interrupt the testimony so he could communicate with his counsel, as needed, through the interpreter. Id. Additionally, the witness gave only brief testimony, in Spanish, which Gonzales-Morales could understand as a Spanish speaker. Id. Given all these factors, the Washington Supreme Court found no constitutional violation. Id. at 386.

By contrast, the Anderson court held the procedure used at Anderson's resentencing violated his constitutional right to privately confer with his attorney. 19 Wn. App. 2d at 563. Unlike Gonzales-Morales, the resentencing court "never set any ground rules for how Mr. Anderson and his attorney could confidentially communicate during the hearing." Id. "Nor were Mr. Anderson and his attorney physically located in the same room," the court explained, "where they might have been able to at least engage in nonverbal communication." Id. Indeed, given that they appeared from different locations, it was

"not apparent how private attorney-client communication could have taken place during the remote hearing." Id. The court of appeals found it "unrealistic to expect Mr. Anderson to assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney." Id. The combination of these factors worked to deprive Anderson of his right to counsel. Id.

Division Three's decision in Anderson is consistent with CrR 3.4(e), which allows preliminary appearances, arraignments, bail hearings, and trial settings to be conducted by video conference. CrR 3.4(e)(3) specifies "[v]ideo conference facilities must provide for confidential communications between attorney and client." Other hearings may be conducted by video conference "only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule." CrR 3.4(e)(2).

Due to health concerns presented by COVID-19, the Washington Supreme Court temporarily altered some court rules, such as speedy trial provisions. Fourth Revised & Extended Order Regarding Court Operations, No. 25700-B-646 (Oct. 13, 2020).[2] But the court did not alter or suspend CrR 3.4(e). See id. While the order directs trial courts to "allow telephonic or video appearances" in criminal cases when "appropriate," it further mandates "courts shall provide a means for defendants . . . to have the opportunity for private and continual discussion with their attorney" at all critical stages. Id. at 10-11 § 16. The Anderson court recognized this order reflects "the role of the judge to make sure that attorneys and clients have the opportunity to engage in private consultation." 19 Wn. App. 2d at 562.

[2] Available at: https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Extended%20and%20Revised%20Supreme%20Court%20Order%20October%202020.pdf.

This Court has not yet considered facts analogous to Anderson. But this Court recently cited Anderson with approval in an unpublished case, In re Personal Restraint of Reed, No. 53037-6-II, 2022 WL 4482748, at *4 (Sept. 27, 2022). In Reed, the victim's mother, who attended trial, used a hearing device as an accommodation for a disability, which picked up even whispered conversations in the courtroom. Id. at *1. Unlike Anderson, the court set grounds rules for how Reed could communicate with his attorney, explaining they could alert the court of the need to speak and the court would allow a break. Id. Reed also remained seated next to counsel, so he could indicate when he wanted to pause the proceedings without interrupting the court. Id. Additionally, their physical proximity allowed them to engage in nonverbal communication. Id. This Court therefore found no violation of Reed's right to confer. Id.

This case involves the very same procedure condemned in Anderson, except on a much more extensive scale. Bragg

appeared by video from jail, while his attorney appeared in person in the courtroom, for *every single hearing* except the trial itself. These proceedings included Bragg's preliminary appearance and bail setting (1RP 3); arraignment (1RP 9); omnibus (1RP 15); multiple trial settings and continuances that included Bragg's speedy trial waiver (1RP 22; 2RP 5); multiple competency review hearings (1RP 19; 2RP 14-16); several hearings on the ongoing conflict between Bragg and his attorney, including his attorney's motion to withdraw due to a breakdown in communication (2RP 9; 3RP 3; 6RP 3, 16); numerous hearings on the state's dilatory conduct in collecting Bragg's DNA (2RP 23, 27; 3RP 5; 4RP 6); motions in limine (4RP 6); and sentencing (7RP 3). See e.g., State v. Charlton, __Wn. App. 2d__, 515 P.3d 537, 546 (2022) (bail setting hearing is a critical stage); In re Pers. Restraint of Sanchez, 197 Wn. App. 686, 698, 391 P.3d 517 (2017) ("The United States Supreme Court long ago stated that the period from arraignment to trial is 'perhaps the most critical period of the proceedings'

during which the accused 'requires the guiding hand of counsel.'" (quoting Powell v. Alabama, 287 U.S. 45, 57, 69, 53 S. Ct. 55, 77 L. Ed. 158 (1932)); Heddrick, 166 Wn.2d at 910-11 (competency hearing is a critical stage); State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987) (sentencing is a critical stage); cf. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (bench conferences between the court and counsel on legal matters that "require resolution of disputed facts" is a critical stage, for purposes of the defendant's related right to be present).

Like Anderson and unlike Reed, the trial court never put on the record whether private communication between Bragg and his attorney was possible. Nor did the trial court once specify any ground rules for how Bragg and his attorney could confidentially communicate during these hearings. At best, Bragg received conflicting information. For instance, at motions in limine, defense counsel asked the court if he could address Bragg. 4RP 21. The court offered to step out, which

counsel declined. 4RP 21. But, at a different hearing about the delayed DNA collection, Bragg tried to interrupt to ask how he could confer with counsel. 2RP 39. The following conversation ensued:

> THE DEFENDANT: Your Honor --
>
> THE COURT: No. I'm not --
>
> THE DEFENDANT: Can I --
>
> THE COURT: No. No. Nope, you're not going to talk right now. You've got an attorney for that.
>
> [Defense counsel] --
>
> THE DEFENDANT: He's not my attorney right now so can I --
>
> THE COURT: No. You're not going to do that. I'm going to cut you off and mute you if you don't stop.
>
> THE DEFENDANT: Okay.
>
> THE COURT: You're not talking to your attorney right now.
>
> THE DEFENDANT: I know. That's what I'm asking you, how can I do that then?

THE COURT: You can be quiet, for one.

2RP 39-40. Very clearly, Bragg did not understand how to consult privately with his attorney and, furthermore, was specifically prohibited from doing so on this occasion.

Nonverbal communication was also impossible because Bragg and his attorney were in different locations, with Bragg the only one appearing by video. As in Anderson, it is not apparent how private attorney-client communication could have even taken place at any of the hearings. While the trial court offered once to step out of the courtroom, that offer was not uniformly applied and was never communicated to Bragg as a means to "private[ly] and continual[ly]" consult with his attorney. Hartzog, 96 Wn.2d at 402.

This Court should apply the well-reasoned rule of Anderson and hold that Bragg's appearance by video, without a means to privately consult with his attorney, for numerous critical pretrial hearings and sentencing, violated his constitutional right to counsel.

"[E]xcept for a limited right to control attorney-client communication when the defendant is testifying, any interference with the defendant's right to continuously consult with his counsel during trial is reversible error without a showing of prejudice." Ulestad, 127 Wn. App. at 214-15. The repeated denial of Bragg's right to confer with his attorney at multiple critical stages therefore constitutes structural error, necessitating automatic reversal.

Anderson applied constitutional harmless error analysis because the parties in that case agreed to that standard. 19 Wn. App. 2d at 564. Anderson declined to address Ulestad because the issue was not raised. Id. at 564 n.2.

Even if denial of the right to confer is not automatic reversible error, reversal is still required here under the constitutional harmless error standard. Constitutional errors are presumed prejudicial. Anderson, 19 Wn. App. 2d at 564. The prosecution bears the burden of establishing the error was harmless beyond a reasonable doubt. Id.

In Anderson, the prosecution met its high burden of showing constitutionally harmless error under the specific facts of the case. Id. at 564. Anderson received all the forms of relief requested at his resentencing hearing. Id. There was no plausible basis for Anderson's attorney to ask to expand the scope of the hearing. Id. Attorney-client consultation therefore could not have made any difference. Id.

The record here is not as forgiving as in Anderson. Bragg's bail was set at $750,000 and never reconsidered. He waived his speedy trial rights. He was ordered to undergo multiple competency evaluations. He had multiple conflicts with his attorney, including requests by both Bragg and his attorney for appointment of new counsel, which were all denied. Bragg objected to the prosecution's unexplained delay in collecting his DNA and moved for exclusion of the DNA results. He was then sentenced to 648 months in prison. All of this and more occurred at hearings where Bragg could not

privately and continuously confer with his attorney. He certainly did not receive all forms of relief requested.

There is simply no way the prosecution can show lack of prejudice beyond a reasonable doubt, given the number and scope of hearings that occurred in violation of Bragg's right to confer. It is impossible to guess how the opportunity for private consultation might have influenced Bragg's (or his attorney's) decision-making or impacted the outcome of his trial. See State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011) (refusing to speculate on the prosecution's behalf where the defendant was denied his constitutional right to be present at all critical stages of the litigation). Thus, even under the constitutional harmless error standard, reversal of Bragg's convictions is necessary.

2. **The trial court erred in refusing to suppress DNA evidence, where the prosecution failed to act with due diligence in collecting Bragg's DNA, which then forced Bragg to choose between his right to a speedy trial and his right to prepared counsel.**

The prosecution inexplicably failed to collect Bragg's DNA for nearly sixth months and, consequently, did not receive the DNA test results until the eve of trial. This mismanagement prejudiced Bragg by forcing him to choose between his right to a speedy trial and his right to prepared counsel. The DNA results should have been excluded under CrR 8.3(b), necessitating reversal of Bragg's convictions.

CrR 8.3(b) provides: "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." "'Fairness to the defendant underlies the purpose of CrR 8.3(b).'" City of Kent v. Sandhu, 159 Wn. App. 836, 841,

247 P.3d 454 (2011) (quoting State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (1996)).

Dismissal is an "extraordinary remedy," to be used as a "last resort." State v. Wilson, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Dismissal is therefore unwarranted "where suppression of evidence may eliminate whatever prejudice is caused by governmental misconduct." State v. Marks, 114 Wn.2d 724, 730, 790 P.2d 138 (1990); accord City of Seattle v. Holifield, 170 Wn.2d 230, 239, 240 P.3d 1162 (2010) (recognizing "suppression presents an appropriate, less severe remedy than dismissal" under identical rule CrRLJ 8.3(b)). The trial court's evaluation of governmental mismanagement under CrR 8.3(b) is reviewed for abuse of discretion. State v. Brooks, 149 Wn. App. 373, 384, 203 P.3d 397 (2009).

Two things must be shown for a court to dismiss charges or suppress evidence under CrR 8.3(b). State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). First, the accused must show arbitrary action or governmental misconduct. Id.

"Governmental misconduct, however, 'need not be of an evil or dishonest nature; *simple mismanagement is sufficient*.'" Id. at 239-40 (quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). "Misconduct occurs when the prosecutor 'inexcusably fails to act with due diligence,' resulting in material facts not being disclosed 'until shortly before a crucial stage in the litigation process.'" State v. Salgado-Mendoza, 189 Wn.2d 420, 433, 403 P.3d 45 (2017) (quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Second, the accused must show prejudice affecting his right to a fair trial. Michielli, 132 Wn.2d at 240. "Such prejudice includes the right to a speedy trial and the 'right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense[.]'" Id. (quoting Price, 94 Wn.2d at 814). The accused demonstrates prejudice where "interjection of new facts into the case when the State has not acted with due diligence will compel him to

choose between prejudicing either of these rights." Price, 94 Wn.2d at 814.

Contrasting case law is useful to consider. In Michielli, the prosecution initially charged the defendant with only one count of theft. 132 Wn.2d at 243-44. The prosecution then waited over three months before adding four additional charges, just five days before trial, based on information it already had at the time of the original charge. Id. at 244-45. The prosecution had no reasonable explanation for the delay. Id. at 243-44. Michielli was then forced to waive his speedy trial right and ask for a continuance to prepare for the surprise charges. Id. at 244. The Michielli court held "[t]he State's delay in amending the charges, coupled with the fact that the delay forced Defendant to waive his speedy trial right in order to prepare a defense, can reasonably be considered mismanagement and prejudice sufficient to satisfy CrR 8.3(b)." Id. at 245.

Similarly, the court of appeals affirmed the trial court's finding of mismanagement in State v. Sherman, 59 Wn. App.

763, 772, 801 P.2d 274 (1990). There, the prosecution failed to produce Internal Revenue Service (IRS) records of the complaining witness by the court-imposed deadline. Id. at 765-66. Although the records were not in the prosecution's possession, they were available to the prosecution's chief witness, who failed to find them in his files. Id. at 768-69. The prosecution neither followed up to ensure the records would be available for trial, nor requested them from the IRS until long after the deadline. Id. The prosecution further waited until after the trial date to seek reconsideration of the omnibus order obligating it to produce the records. Id. This mismanagement compromised defense counsel's ability to adequately prepare for trial. Id. at 771-72.

Conversely, the supreme court in Blackwell held the prosecutor's failure to produce personnel records did not amount to misconduct. There, the trial court ordered the prosecution to produce the service records and personnel files of two police officers. Blackwell, 120 Wn.2d at 825. The

prosecution objected because it did not have access to or control over the documents. Id. The court held the prosecutor acted reasonably: he attempted to obtain the records, advised both the court and defense counsel of his efforts, and suggested that the court issue a subpoena duces tecum. Id. Thus, "[t]here was no showing of 'game playing,' mismanagement, or other governmental misconduct on the part of the State that prejudiced the defense." Id. at 832.

Mr. Bragg's case is akin to the mismanagement in Michielli and Sherman. Bragg was arrested late on May 3, charged on May 4, and arraigned on May 6, 2021. 1RP 9-10; CP 1-5, 185. Bragg could not make his $750,000 bail and remained in custody pending trial. 1RP 7; 4RP 23.

John Cravens found a Ruger pistol along the chase route the same day Bragg was charged, May 4, and turned it over to law enforcement. 4RP 302, 328. Deputies promptly collected DNA from Cravens, Chief Brockmueller, who also handled the gun, and Sherry Hitch, who was believed to be the owner of the

gun, all within just a couple days of May 4. 4RP 293 (Hitch, "[m]aybe the 5th of May"), 308 (Cravens, "a day or two later"), 316 (Brockmueller, "that evening"). The firearm was then sent to the crime lab for DNA testing. 4RP 17.

The prosecution then waited until August 3—three months later, while Bragg waited in custody—to move for collection of Bragg's DNA. CP 146-48. The prosecution never explained why it waited so long to request collection of Bragg's DNA when it clearly intended to test the firearm for DNA. See 4RP 17 (admitting in December the initial testing was done "months ago," and conceding, "we knew there was DNA on the gun and the magazine"). The immediate collection of DNA from Cravens, Brockmueller, and Hitch belies any explanation the prosecution might now attempt to provide. This is akin to Michielli, where the prosecution had all the information it needed at the outset, yet inexplicably failed to act.

The prosecution further failed to explain the additional three month delay in collecting Bragg's DNA once it obtained

the buccal swab order. The order was entered on August 5, but the sheriff's office did not attempt to collect Bragg's DNA until October 29.[3] CP 149-50; 2RP 23-24. The prosecution never discerned a reason for the delay and did not even try to give one, explaining only, "for whatever reason, and I still haven't been able to figure it out, the swab wasn't taken by the Sheriff's Office." 4RP 16.

The prosecution may try to deflect blame by arguing the nearly three month delay from August 5 to October 29 can be attributed to the sheriff's office, not the prosecution. But Sherman establishes the prosecution must act with due diligence in attempting to collect evidence, even when that evidence is not in the prosecution's possession. Similarly, in Salgado-Mendoza, the supreme court held the prosecution failed to act with due diligence in narrowing its witness list, constituting mismanagement, even though it was the toxicology

[3] Bragg's DNA was ultimately collected on November 1, so his refusal added only four days to the timeline. CP 38.

lab's practice not to reveal the individual witness's name until the morning of trial. 189 Wn.2d at 435. The prosecution's failure to ensure Bragg's DNA was timely collected and submitted to the crime lab is analogous to the prosecution's failure to act in Sherman and Salgado-Mendoza.

The trial court agreed the prosecution failed to provide any justifiable reason for the delay. 4RP 20. But the court nevertheless found no "negligence or misconduct." 4RP 20. The cases discussed above demonstrate the trial court abused its discretion in reaching this conclusion because it did not apply the correct rule of law. The prosecution's unjustified failure to act with due diligence constitutes mismanagement. Bad faith or gross negligence is not necessary to meet this standard; "simple mismanagement is enough." Brooks, 149 Wn. App. at 384.

The trial court also believed there was no prejudice to Bragg because his speedy trial rights had not been violated. 4RP 20. This, too, was a misapplication of the law. The prosecution's lack of due diligence prejudices the accused when

it results in the "interjection of new facts" that compel the accused to choose between his speedy trial rights and his right to be represented by counsel "who has had the opportunity to adequately prepare a material part of his defense." Michielli, 132 Wn.2d at 240; Brooks, 149 Wn. App. at 387. This standard is quite clearly met here.

The prosecution's delay in collecting Bragg's DNA meant it did not obtain the relevant DNA results until December 28, 2021. Ex. 71. Bragg's trial was set for less than a week later, January 3, 2022, with speedy trial expiring that same day. 1RP 24-25; CP 196. The DNA results were incredibly harmful to Bragg's defense. Bragg was left to choose between exercising his speedy trial right and exercising his right to effective assistance of counsel. With more time, defense counsel would have retained an expert to evaluate the DNA results. 3RP 9; 4RP 15. As defense counsel aptly put it, the prosecution's unexcused delay forced Bragg to "a

constitutional choice." 3RP 9. This is the very definition of prejudice in this context.

While suppression of evidence under CrR 8.3(b) is "at the discretion of the trial court," that discretion must be appropriately exercised. Salgado-Mendoza, 189 Wn.2d at 430. The trial court here did not apply the applicable legal standard for either mismanagement or prejudice. The prosecution failed to act with due diligence when it inexplicably did not collect Bragg's DNA for nearly six months. This delay then prejudiced Bragg by forcing him to choose between his speedy trial right and his right to prepared counsel. Under the circumstances, suppression of the DNA results was the only adequate remedy to isolate the prejudice from the prosecution's dilatory conduct.

The prosecution may argue in response that defense counsel failed to cite any authority to the trial court in requesting exclusion of the evidence. To the extent defense counsel failed to recognize the issue as one of government

mismanagement under CrR 8.3(b), and provide the trial court with relevant authority, counsel was constitutionally ineffective. The constitutional right of the accused to effective assistance of counsel is violated when (1) defense counsel's performance was deficient and (2) the deficiency prejudiced the accused. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017).

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Estes, 188 Wn.2d at 458. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Counsel's motion to exclude the DNA results clearly invoked CrR 8.3(b), yet counsel failed to cite any authority that would have guided the trial court in exercising its discretion. CP 45-46; 4RP 12-19. The result was the trial court's misunderstanding of the controlling legal standard. There is no reasonable strategy that could explain

counsel's failure to conduct research and cite relevant authority to support the suppression motion.

Prejudice occurs when there is a reasonable probability that, but for counsel's error, the outcome of the proceedings would have been different. Estes, 188 Wn.2d at 458. As discussed, the trial court should have suppressed the DNA results based on proper application of the law. Exclusion of that evidence would have made a material difference at Bragg's trial. The DNA results definitively linked Bragg to the gun. Without that evidence, there would have been only a tenuous connection between Bragg and Hitch's missing gun, which she could not even identify because she did not know the serial number. 4RP 344-45, 347-48.

Additionally, absent the DNA evidence, discrepancies in the deputies' testimony would have mattered more. The dynamics depicted in Deputy Teitzel's diagram made a bullet strike on his right fender impossible, because the right side of his vehicle was turned away from Bragg. Ex. 52. Deputy

Teitzel and Deputy Woods both testified they could not see a gun in Bragg's hand, due to the poor lighting, and Deputy Woods could not see where Bragg was pointing. 4RP 187, 424. Yet, somehow, Deputy Wallace, who was farther away than both Deputy Teitzel and Deputy Woods, claimed he could see the gun, Bragg's facial hair, and exactly where Bragg was aiming. 4RP 272-73, 276. These inconsistencies were critical, because of Bragg's defense that he was not aiming at the deputies, but merely firing warning shots, and therefore did not intend to inflict great bodily harm as required for first degree assault. 5RP 614-15, 618-20; CP 74-76.

The DNA evidence should have been excluded under CrR 8.3(b), based on proper application of the relevant law. Defense counsel's failure to recognize and cite that law denied Bragg his right to effective assistance of counsel. This Court should therefore reverse Bragg's convictions for first degree assault, drive-by shooting, and possession of a stolen firearm, and remand for further proceedings.

3. The outcome of Bragg's trial was unfairly prejudiced by the prosecution's repeated reference to Bragg's outstanding arrest warrants, which suggested his propensity for crime.

The trial court granted exclusion of any prior bad acts aside from Bragg's predicate offense, which prohibited him from possessing a firearm. The prosecution then immediately violated this ruling by emphasizing Bragg's outstanding arrest warrants in opening statement. The trial court thereafter admitted that evidence for Bragg's motive to flee law enforcement, even though the prosecution had other admissible, less inflammatory evidence of motive. Under the circumstances, the trial court erred in denying Bragg's mistrial motion and then in admitting the evidence. The highly prejudicial nature of the evidence necessitates reversal.

Though a trial court's denial of a mistrial motion is reviewed for abuse of discretion, such denial must be overturned when there is a "'substantial likelihood' that the error prompting the request for a mistrial affected the jury's

verdict." State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)). In making this determination, courts consider (1) the seriousness of the irregularity, (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard the irregularity. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

"[A] violation of a pretrial order is a serious irregularity." State v. Gamble, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). So is "[a]n intentional introduction of inadmissible evidence relating to criminal history." Id. For instance, in Gamble, the trial court granted the defendant's pretrial motion to exclude evidence of his prior convictions. Id. at 176. Despite this ruling, a detective improperly referenced the defendant's "King County booking file." Id. at 176. The Gamble court held the detective's statement constituted a serious irregularity because it violated the pretrial order and referenced the defendant's

prior criminal conduct, even though did not identify any specific conduct. Id. at 178.

Here, the defense moved to exclude all reference to Bragg's prior bad acts "unrelated to the predicate" offense necessary to prove unlawful possession of a firearm. 4RP 24-25; see also CP 45 (written motion, "To preclude State from bringing up other alleged prior bad acts outside the necessary predicate offense needed to prove the UPF charge."). The prosecution agreed it would not introduce any such evidence and the court granted the defense motion in limine. 4RP 25.

The prosecution then twice in opening statement emphasized Bragg's outstanding arrest warrants and his suspended license. 4RP 127-28. This violated the court's ruling in limine. Though the prosecution claimed the court did not rule on the outstanding arrest warrants, 4RP 150, the record does not bear this out. The prosecution agreed to and the court granted the defense request for blanket exclusion of all ER 404(b) evidence except the predicate offense. 4RP 25. ER

404(b) evidence is presumptively inadmissible. State v. Fuller, 169 Wn. App. 797, 829, 282 P.3d 126 (2012). If the prosecution wants to introduce ER 404(b) evidence for a purpose other than proving a predicate offense, "then it must ask the trial court for such a ruling." State v. Feely, 192 Wn. App. 751, 768, 368 P.3d 514 (2016). The prosecution did no such thing. See State v. Ecklund, 30 Wn. App. 313, 316 n.2, 633 P.2d 933 (1981) (expressing dismay at the prosecution's decision to present ER 404(b) evidence "without having first presented it to the trial court in the form of an oral offer of proof").

What is more, a deputy later referred to Bragg's custody status, testifying he collected Bragg's DNA "at the facility he was in." 4RP 367. Even if some jurors might not have picked up on the reference, others might have. Bragg's pretrial detention suggested he was a dangerous individual and a threat to public safety, who needed to be imprisoned. The reference

to his custody status accumulated with the improper discussion of his outstanding arrest warrants.

Evidence of Bragg's outstanding warrants was not cumulative of other properly admitted evidence. Ultimately, the prosecution could not prove Bragg's predicate offense for unlawful possession of a firearm. 5RP 506, 526-29. The jury heard no other evidence of Bragg's criminal history.

Finally, the repeated references to Bragg's outstanding warrants could not have been cured by an instruction to disregard. Evidence of the accused's criminal history is "inherently prejudicial" because it suggests a propensity for crime. State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996). This is particularly true in Bragg's case, where the trial court refused to admit the basis for the warrants, which was driving with licensed suspended. 4RP 154. The jury was left to speculate that the warrants could be for anything, perhaps even for additional violent offenses involving law enforcement.

Escalona is on point. In a trial for second degree assault with a deadly weapon, a witness testified Escalona "already has a record and had stabbed someone." Escalona, 49 Wn. App. at 253. Even though the trial court instructed the jury to disregard the improper statement, the court of appeals held "it would be extremely difficult, if not impossible" for the jury to ignore "this seemingly relevant fact." Id. "[N]o instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" Id. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

Not only should the court have granted Bragg's mistrial motions, it erred in admitting Bragg's outstanding warrants as evidence of his motive to flee. Before admitting ER 404(b) evidence for a permissible purpose such as motive, the court must apply ER 403 and determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d

937 (2009). This balancing must be done on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). "[W]ithout a complete analysis appearing on the record," the reviewing court cannot "determine whether a trial court's exercise of discretion was based upon a careful and thoughtful consideration of the issue." State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

"Unfair prejudice" in the context of ER 403 "means an undue tendency to suggest a decision on an improper basis." State v. Stackhouse, 90 Wn. App. 344, 356, 957 P.2d 218 (1998). "If the evidence is distinctly prejudicial in this sense, and if other less inflammatory evidence is available to adequately make the same point, the balance is tipped towards exclusion." KARL TEGLAND & ELIZABETH TURNER, 5 WASH. PRACTICE, EVIDENCE LAW & PRACTICE § 403.3 (6th ed. 2022). "'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.'" Smith, 106 Wn.2d

at 776 (quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

The trial court conducted no such balancing in Bragg's case. The court merely identified the relevance and purpose for the arrest warrants, but did not evaluate whether the prejudicial effect of that evidence outweighed the probative value. 4RP 151-54. Unquestionably, it did.

Even assuming the relevance of the arrest warrants, the prosecution had other admissible, less inflammatory evidence that indicated Bragg's motive to elude. For one, Bragg had no license plate on his vehicle and committed a traffic violation. 4RP 260. For another, Bragg admitted he was high on methamphetamine and other drugs at the time. 4RP 292. Bragg was also suspected of stealing Hitch's pistol. 4RP 260-61. All of these gave Bragg motive to flee and, indeed, the prosecution argued as much in closing. 5RP 583.

"Prosecutors are not given a carte blanche to introduce every piece of admissible evidence if the cumulative effect of

such evidence is inflammatory and unnecessary." State v. Crenshaw, 98 Wn.2d 789, 807, 659 P.2d 488 (1983). Evidence of Bragg's outstanding arrest warrants was unnecessary and inflammatory. This is particularly true where the jury did not learn the warrants were for the relatively innocuous offenses of driving with license suspended. Additionally, the trial court did not give any instruction limiting the jury's consideration of the warrants to Bragg's motive to flee. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) ("If the evidence is admitted, a limiting instruction must be given to the jury."). The jury was therefore allowed to consider the evidence precisely for its forbidden purpose—Bragg's propensity to disobey the law.

Given the other evidence of Bragg's motive to flee, the danger of unfair prejudice vastly outweighed the probative value of Bragg's outstanding warrants. The trial court erred in failing to conduct the requisite balancing on the record, which would have necessitated exclusion. See Carleton, 82 Wn. App.

at 685 (holding the trial court's failure to "weigh[] the consequences" of admitting ER 404(b) on the record is error).

Erroneous admission of ER 404(b) evidence requires reversal where there is a reasonably probability the outcome of the trial would have been different without the evidence. State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). This standard is met here. As established, the evidence of Bragg's active warrants was highly prejudicial and indicated his propensity for crime. This was especially significant, where Bragg was accused of stealing a firearm and then trying to shoot multiple sheriff's deputies. The fact of outstanding arrest warrants undoubtedly made it more likely in jurors' minds that Bragg was aiming at the officers with intent to do them great bodily harm. Bragg's convictions should therefore be reversed for this additional reason.

4. Resentencing is necessary where the trial court failed to recognize its authority to impose concurrent sentences for multiple serious violent offenses.

The trial court failed to recognize its authority under RCW 9.94A.535(1)(g) to impose concurrent, rather than consecutive, sentences for multiple serious violent offenses. Clear authority from our state supreme court holds this failure constitutes a fundamental defect in the sentence. Remand for resentencing is necessary, where Bragg's sentence is significantly longer than the average sentence for the even more serious offenses of first and second degree murder.

"[E]very defendant is entitled to have an exceptional sentence actually considered." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). A sentencing court therefore errs "when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" Id. (alteration in original) (quoting In re Pers. Restraint of Mulholland, 161 Wn.2d

322, 333, 166 P.3d 677 (2007)). "[A]n erroneous sentence, imposed without due consideration of an authorized mitigated sentence, constitutes a 'fundamental defect' resulting in a miscarriage of justice." Id. at 58 (quoting Mulholland, 161 Wn.2d at 332).

Bragg's three convictions for first degree assault are classified as serious violent offenses. RCW 9.94A.030(46)(a)(v). RCW 9.94A.589(1)(b) mandates that sentences for multiple serious violent offenses arising from separate and distinct criminal conduct "shall be served consecutively to each other." However, the trial court has authority to order serious violent offenses to run *concurrently* as an exceptional sentence downward if "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g); State v. Graham, 181 Wn.2d 878, 887, 337 P.3d 319 (2014).

Mulholland is directly on point here. Mulholland was convicted on multiple counts of first degree assault for a drive-by shooting into an occupied home. Mulholland, 161 Wn.2d at 325-26. Believing it had no discretion to do otherwise, the sentencing court imposed consecutive sentences for the assaults under RCW 9.94A.589(1)(b). Id. at 326. The Washington Supreme Court held the court's failure to recognize its authority to impose concurrent sentences for serious violent offenses was a "fundamental defect" in Mulholland's sentence. Id. at 333.

The supreme court reaffirmed the holding of Mulholland in Graham, emphasizing "a sentencing judge may invoke .535(1)(g) to impose exceptional sentences . . . for multiple serious violent offenses under .589(1)(b)." Graham, 181 Wn.2d at 885; see also McFarland, 189 Wn.2d at 55 (extending Mulholland to presumptively consecutive firearm-related offenses under RCW 9.94A.589(1)(c)). The Graham court explained "concurrent sentences are sometimes necessary to

remedy injustices caused by the mechanical application of grids and ranges." 181 Wn.2d at 885.

Here, like the sentencing courts in Mulholland and Graham, the court did not recognize its discretion to run Bragg's sentences concurrently under RCW 9.94A.535(1)(g). Neither party filed any sentencing memoranda; the prosecution filed only its scoring sheets for each count and a summary of Bragg's criminal history. CP 114-25. At sentencing, the prosecution noted the three assault convictions "all run consecutive to one another." 7RP 5. Defense counsel agreed to "the consecutive nature of the charges." 7RP 11. At no point did either party bring Mulholland to the court's attention or identify RCW 9.94A.535(1)(g) as a basis for concurrent sentences.

The trial court thereafter found "[t]hose all three run consecutively," noting, "Counts 2 and 3, by statute, because they run consecutive to Count 1, are scored an offender score of zero." 7RP 24. The court did not mention Mulholland or any discretion to depart from the harsh multiple offense policy of RCW

9.94A.589(1)(b). The record is clear: the court believed it had no authority to impose anything other than consecutive sentences for the three assault convictions.

Remand for resentencing is necessary where record suggests "at least the possibility" that the sentencing court would have considered imposing concurrent sentences "had it properly understood its discretion to do so." McFarland, 189 Wn.2d at 59. The record need not show with "certainty" that the sentencing court would have imposed a mitigated exceptional sentence. Mulholland, 161 Wn.2d at 334.

There is no dispute the sentencing court in Bragg's case was frustrated with the carelessness of his actions, which put the three sheriff's deputies and the community in harm's way. 7RP 17-18. But the court also acknowledged Bragg's addiction drove his actions. 7RP 17. And, although the court rejected Bragg's request for a low-end sentence, the court also did not impose the high end of the standard range. 7RP 18-19. Defense counsel further pointed out, the amount of time Bragg faced "is

astronomical," despite no one being injured. 7RP 12. Counsel emphasized even the low-end of consecutive sentences, 49 years, "is very likely a lifetime sentence for him." 7RP 12.

Defense counsel's point is relevant, because the Washington Supreme Court in Graham emphasized sentencing courts must examine each of the seven policy goals enumerated in RCW 9.94A.010 "when imposing an exceptional sentence under .535(1)(g)." Graham, 181 Wn.2d at 886. Two of these goals are to "[e]nsure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history," and "[b]e commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(1), (3).

Bragg was sentenced to 648 months—54 years—in prison for crimes where no one was killed or injured. In 2021, the average sentence imposed was 451.5 months for first degree murder and 228 months for second degree murder. WASH. STATE CASELOAD FORECAST COUNCIL, STATISTICAL SUMMARY OF

ADULT FELONY SENTENCING FISCAL YEAR 2021, at 19 (2021).[4] Bragg's sentence therefore exceeds the average 2021 first degree murder sentence *by more than 16 years*. But, because the court did not evaluate the appropriateness of concurrent sentences under RCW 9.94A.535(1)(g), it did not consider whether Bragg's 648-month sentence was proportionate to sentences for even more serious offenses, which Graham requires it to do.

Bragg's sentence significantly exceeds the average punishment for the most serious offense in our state short of aggravated murder. RCW 9.94A.515 (assigning seriousness level of XV to first degree murder, XIV to second degree murder, and XII to first degree assault). Consequently, it is possible the court would have considered imposing concurrent sentences had it recognized its authority to do so. Under the clear and controlling authority discussed above, this Court should reverse Bragg's sentence and remand for a new sentencing hearing at

[4] Available at: https://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2021.pdf.

which the court "meaningfully consider[s]" a mitigated sentence. State v. O'Dell, 183 Wn.2d 680, 689, 358 P.3d 359 (2015).

5. The judgment and sentence erroneously includes discretionary supervision fees.

At sentencing, the court expressed its intent to impose only the mandatory $500 victim penalty assessment. 7RP 20. The court also found Bragg indigent "as defined in RCW 10.101.010(3)(a)-(c)" because he "receives an annual income, after taxes of 125 percent or less of the current federal poverty level." CP 127. Despite the court's finding of indigency and stated intent to waive all discretionary LFOs, the judgment and sentence ordered, as a condition of Bragg's 36-month community custody term: "(7) pay supervision fees as determined by DOC." CP 129.

The Washington Supreme Court recently held supervision fees are discretionary LFOs, waivable by the trial court. State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021); see also RCW 10.01.160(3) (prohibiting imposition of discretionary LFOs

when trial court finds defendant indigent). The Bowman court concluded a trial court "commit[s] procedural error by imposing a discretionary fee where it had otherwise agreed to waive such fees." 198 Wn.2d at 629. The court ordered supervision fees to be stricken from Bowman's judgment and sentence. Id.

Bowman compels the same result here. The trial court intended to waive all discretionary LFOs. 7RP 20. This Court should remand for the discretionary supervision fees to be stricken from Bragg's judgment and sentence.

D. CONCLUSION

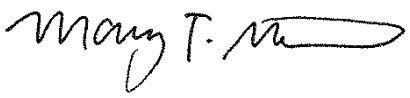
For the reasons discussed above, this Court should reverse Bragg's convictions and remand for further proceedings. Alternatively, this Court should reverse Bragg's sentence and remand for resentencing and for the trial court to strike the discretionary supervision fees.

DATED this 25th day of October, 2022.

I certify this document contains 11,799 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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